



Personal
Communications
Industry
Association

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 7, 1994

BY HAND

Dr. Robert M. Pepper
Chief, Office of Policy and Plans
Federal Communications Commission
1919 M Street NW, Room 822
Washington, D. C. 20554

RE: Implementation of Section 309(j) of the Communications Act: Competitive Bidding
(PP Docket No. 93-253)

Ex Parte

Dear Dr. Pepper:

The association is aware that the question has been raised as to whether the Federal Communications Commission is required to follow the full and open competition requirements of the Competition in Contracting Act and Federal Acquisition Regulations if it chooses to secure outside assistance in the conduct of spectrum auctions. I am enclosing a legal analysis prepared by Wiley, Rein and Fielding for the Personal Communications Industry Association (formerly Telocator) which fully briefs the two exceptions to the general requirements of CICA and FAR, both of which appear to apply in these circumstances.

We would be pleased to meet with you or other Commission staff to discuss this in more detail and to answer any questions you might have.

Sincerely yours,

Mark J. Golden, CAE
Vice President-Government Relations

cc: William Kennard, General Counsel
David R. Siddal, Office of Engineering and Technology
Kent Nakamura, Private Radio Bureau
Bruce A. Franca, Office of Engineering and Technology
Karen Brinkman, Office of the Chairman
William Caton, Office of the Secretary

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WILEY, REIN & FIELDING

MEMORANDUM

TO: Personal Communications Industry Association

FROM: R. Michael Senkowski
Philip J. Davis

DATE: February 7, 1994

RE: FCC's Authority to Secure a Support Service Contractor
for Competitive Bidding Implementation

I. INTRODUCTION

A question has been raised whether the Federal Communications Commission ("FCC" or "Commission"), in implementing Title VI of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), is required to follow the full and open competition requirements of the Competition in Contracting Act ("CICA") and its implementing provisions in the Federal Acquisition Regulation ("FAR"). Research shows that, under the terms of CICA and the FAR, as well as applicable precedent, there are two exceptions to the general requirement for competition which could apply in the circumstances here.

The first, the so-called "Public Interest" exception, provides that full and open competition need not be provided for when the agency head determines that it is not in the

public interest to do so, provided the agency head complies with prescribed procedural requirements. Where, as here, an agency is required to comply with a Congressional mandate of significant importance to the public at large, the use of this exception appears especially appropriate.

The second exception which appears applicable is the so-called "Unusual and Compelling Urgency" exception. Under this exception, full and open competition is not necessary when an agency's need for supplies or services is of such "unusual and compelling urgency" that the Government would be "seriously injured" unless it was permitted to limit competition. As with the Public Interest exception, certain procedural steps must be followed in order to properly rely on this exception. However, the head of the agency need not be involved, for the authority to invoke this exception is within the purview of the Contracting Officer.

In this instance, the FCC has actively pursued the implementation of the competitive bidding and licensing provisions of the Budget Act since its passage. Under its established procedures, the Commission has had to invite full public comment and afford due consideration to various options for implementing competitive bidding. It now appears that the FCC might require the help of a support services contractor to assist it in meeting its mandate to begin issuing licenses and permits for Personal Communications Services ("PCS") by May 7, 1994, and to effectively achieve

Congressional goals. Under these unusual and compelling circumstances, it appears appropriate for the FCC to take such actions as are necessary to avoid the serious harm to the Government that would occur if the licensing and permitting process could not be initiated in a timely and efficient manner.

II. BACKGROUND

On August 10, 1993, Congress enacted the Budget Act. The Budget Act directs the FCC to prescribe competitive bidding regulations by March 8, 1994 (within 210 days after the date of enactment) and to begin issuing licenses and permits for PCS by May 7, 1994 (270 days after enactment).

Among other things, Title VI of the Budget Act amended the Communications Act of 1934 ("1934 Act") by authorizing the FCC to utilize a system of competitive bidding to award licenses for radio services. More specifically:

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

(Budget Act § 6002(a); 1934 Act § 309(j)(1)(emphasis added)).¹ The FCC may utilize competitive bidding procedures to issue licenses "only when the Commission accepts for filing mutually exclusive applications for a license and the Commission has determined that the principal use of that license will be to offer service in return for compensation from subscribers." (H.R. Rep. No. 213, 103d Cong., 1st Sess. 473 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1162).

The Budget Act directed the FCC to:

[P]rescribe regulations to implement section 309(j) . . . within 210 days after the date of enactment . . . [and] within 270 days after such date of enactment, commence issuing licenses and permits in the personal communications service.

(Budget Act § 6002(d)(1), (2)(B)). The Budget Act does not specify the competitive procedures to be used but, rather, leaves it to the FCC to establish a "competitive bidding methodology" by regulation and to "design and test multiple alternative methodologies [for issuing licenses or permits] under appropriate circumstances." (Id. § 6002(a)(3)).

The FCC released its Notice of Proposed Rulemaking to implement the competitive bidding provisions of the Budget Act on October 12, 1993. Public comments were required by November 10, 1993. Due to the volume of the comments -- approximately 200 -- the FCC's reply date was extended from

¹ Licensing was previously accomplished by lottery or through comparative hearings in an auction-like proceeding.

November 24 to November 30, 1993. Competitive bidding regulations must be prescribed by March 8, 1994.

The FCC is currently evaluating the record in this proceeding and various entities are in the process of conducting experiments on bidding methodologies. For example, NTIA advocates the use of simultaneous electronic bidding and planned to conduct a software experiment at CalTech on January 27-28 to demonstrate the feasibility of this approach. The Commission is expected to announce its general competitive bidding rules at its March open meeting. The rules will be subject to the reconsideration process.

On a related note, the Commission issued its PCS rules on October 22, 1993. These rules identify the number of PCS licenses upon which prospective licensees would be bidding, the PCS service areas available, and other matters. Sixty-six parties filed petitions for reconsideration of these rules on December 8, 1993. Public comments and reply comments on the petitions were received on January 3 and January 13, respectively. As noted above, the statutory deadline for issuing PCS licenses is May 7, 1994, 270 days after the date of enactment of the Budget Act.

III.

**Alternative Methods of Acquiring the Services of a
Support Contractor to Meet Statutory Mandates**

1. **CICA in General**

CICA requires that, with certain limited exceptions, executive agencies conducting a procurement for supplies or services:

- (A) shall obtain full and open competition through the use of competitive procedures . . . and
- (B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(41 U.S.C. § 253 (a)(1)). These provisions are implemented in the FAR which applies to the acquisition of all goods and services obtained by an executive agency, such as the FCC, pursuant to a contract that obligates the Government to expend appropriated monies. (FAR §§ 1.103, 2.101, 6.101). The phrase "competitive procedures" refers to procedures under which an agency enters into a contract pursuant to full and open competition. (41 U.S.C. §§ 259(b)(2), 403(b)). A contract is deemed to be awarded pursuant to full and open competition when all responsible sources are permitted to compete for the product or service being acquired. (41 U.S.C. § 403(7); FAR § 6.003).

CICA also provides that an agency may use other than fully competitive procedures in seven specific circumstances: (1) only one specific source can satisfy the Government's needs, (2) competition must be restricted due to unusual and compelling circumstances, (3) to facilitate industrial mobilization, (4) to comply with a treaty or international agreement, (5) when expressly authorized by statute or for brand-name commercial items for resale, (6) to protect National Security, and (7) when deemed in the Public Interest by the agency head. (41 U.S.C. § 253(c); FAR § 6.302). However, an agency is prohibited by CICA from using these procedures on the basis of "lack of advance planning" on the agency's part. (41 U.S.C. 253(f)(5)(A); FAR § 6.301(c)).

2. The Public Interest Exception to Full and Open Competition

The so-called "Public Interest" exception appears applicable here. This exception may be invoked when the head of an agency:

- (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and
- (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(41 U.S.C. § 253(c)(7); accord, FAR § 6.302-7). Certain procedural prerequisites apply to this exception: (i) the

decision by an agency head must be supported with a determination and finding ("D&F") prepared pursuant to subpart 1.7 of the FAR; (ii) the D&F must be signed by the agency head (this responsibility cannot be delegated); (iii) Congress must be notified not less than 30 days before award of a contract; and (iv) this exception may only be used when no other exception to competition applies. (FAR § 6.302-7).²

Of particular interest to the issues faced by the FCC is a recent decision of the General Accounting Office ("GAO") denying a protest that involved, among other things, an agency head's decision to limit competition on the basis of the public interest exception. (See Affiliated Precision Services, Inc., B-253757, 1993 WL 437173). Although the particular issue raised by the protester in Affiliated Precision was its classification as other than a small business, it was decided in the context of the NASA Administrator's reliance on the Public Interest exception in order to comply with a statutory goal:

The agency explains that this procurement was set aside for SDB concerns to meet NASA's statutory goals, as set out in the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act

² The term "agency head" shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(41 U.S.C. § 259(a)).

of 1993, Pub. L. No. 102-389, 106 Stat. 1571, 1610 (1992), that 8 percent of the total value of NASA's prime contracts and subcontracts be awarded to SDB firms NASA further explains that the set-aside was conducted pursuant to a determination made under 10 U.S.C. 2304(c)(7) (1988) [the DoD and NASA counterpart to 41 U.S.C. 253(c)(7)] that it is in the public interest to use other than competitive procedures for this procurement.

(Id. n. 1).³

In the context of a procurement protest, a determination by the head of an agency to limit competition in the public interest will not be reviewed by the GAO. (See Acumenics Research and Technology, Inc. -- Contract Extension, B-224702, 87-2 CPD ¶ 128). However, a protest will be entertained by the GAO if the agency head does not follow the procedures prescribed by CICA and implemented by the FAR. (See id. (protest sustained because agency head did not comply with 30-day Congressional "report and wait" requirement)).

It would appear that if the GAO in Affiliated Precision did not contest the use of the Public Interest exception to comply with a statutory goal of increasing small business

³ Agency heads have also limited competition citing the Public Interest exception in non-statutory contexts, such as for the design and procurement of chemical/biological masks (Ames-Avon Industries -- Recon., B-227839, B-227839.4, 87-2 CPD ¶ 150), and for the construction of family housing in the Philippines to support political and economic objectives (Zublin Delaware, Inc., B-227003, B-227003.2, 87-2 CPD ¶ 149).

participation in federal procurements, it would not entertain a protest questioning the use of the Public Interest exception to comply with a statutory mandate, especially in view of GAO's position that it will not review such discretionary decisions of an agency head. (See Acumenics, supra).

3. Unusual and Compelling Urgency Exception

CICA also recognizes that an executive agency may limit competition on a particular procurement:

When the agency's need for the supplies or services is of such unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals

(41 U.S.C. § 253(c)(2); FAR § 6.302-2(a)(2)).

As with the Public Interest exception, the FAR prescribes procedures for the utilization of this exception. Thus, when relying on this exception, an agency must:

- Support its decision to limit competition with a written justification and approval ("J&A"); and
- Request offers from as many sources as is practicable under the circumstances.

(FAR § 6.302-2(c)(1)-(2)). The J&A may be prepared and approved after the contract is awarded if its preparation and

approval prior to award would unreasonably delay the contract. (Id.; 41 U.S.C. § 253 (f)(2)).

Agencies have justified restricting competition pursuant to the Unusual and Compelling Urgency exception in a variety of circumstances:

- To provide test results to Congress prior to Congress' consideration of FY1988 appropriations based on Congressional direction in the FY1987 Authorization Act to "submit a plan for testing and evaluating the Bradley's combat survivability." (Fairchild Weston Systems, Inc., B-225649, 87-1 CPD ¶ 479);⁴
- To comply with requirements of the Clean Air Act (K-Whit Tools, Inc., B-247081, 92-1 CPD ¶ 382 (protest sustained because urgency was created by agency's lack of advance planning));
- To award a sole source contract to the only firm the agency reasonably believed could meet its needs for radioactive waste management services within the time available (RSO, Inc., B-250785.2, B-250785.3, 93-1 CPD ¶ 489); and
- To procure x-ray security screening systems for use in the federal court system (Heimann Systems Co., B-238882, 90-1 CPD ¶ 520).

The FCC has aggressively pursued the requirements of the Budget Act within the constraints of its required rulemaking procedures, and it has only now, after full public proceedings, determined that it will require the services of a support contractor. In such circumstances, it would appear

⁴ In Fairchild, the GAO upheld the agency's reliance on this exception in the circumstances presented but, nonetheless, sustained this exception on procedural grounds because the agency did not solicit proposals from "as many sources as is practicable under the circumstances."

that limiting competition under this exception is appropriate, since there is insufficient time for the FCC to obtain those services using full and open competition and still meet its statutory obligations.

IV. CONCLUSION

Either the Public Interest or the Unusual and Compelling Urgency exception to full and open competition would appear to permit an agency to limit competition to comply with a statutory requirement. The Public Interest exception requires the agency head to sign a D&F asserting that the limitation on competition is in the public interest. If the procedures prescribed in CICA and the FAR are followed, GAO will not review the agency's decision. This exception can only be used if no other exception is available.

An agency may also limit competition when faced with an Unusual and Compelling Urgency and where not doing so would cause serious injury to the Government. A decision to invoke this exception must be supported by a J&A and proposals should be solicited from as many sources as practicable. Under this exception, a sole source award is justified where

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the agency reasonably believes that only one firm can meet its needs within the time available.

* * *

Please contact us if we can be of further assistance.

Wiley, Rein & Fielding